VI. MULTIPLE REPRESENTATION/CONFLICTS OF INTEREST

A. Introduction

Multiple or dual representation (i.e., when a lawyer or law firm represents more than one client in the same case or investigation) occurs frequently in antitrust grand jury investigations and may lead to conflicts of interest. Conflicts may arise when an attorney represents a corporation and all or several individuals employed by the corporation. Not infrequently, more than one of a target company's officers are also targets and represented by the same lawyer. Even when each target has a different lawyer, the target company may pay all the legal fees. Occasionally, two individual targets from different companies are represented by the same lawyer or law firm, and less frequently, there may be a conflict between a lawyer's present client and his former client who are both subjects or targets of the same investigation.[1]

Multiple representation and attendant conflicts of interest create problems for the Government, the lawyer, the clients and the court. Among the problems created by multiple representation are improper impediments to the grand jury investigation by inhibiting cooperation that might otherwise be forthcoming, and violations of an attorney's ethical obligations to his client and to the court. Finally, and perhaps most significantly, since "[n]o man can serve two masters" (Matt. 6:24), an attorney serving two clients may favor one at the expense of another.

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[1] See Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1 (1983).

Initially, multiple representation may impede the grand jury investigation by rendering cooperation less likely. For example, under the immunity statute, 18 U.S.C. § 6003, the testimony of a witness may be compelled where it "may be necessary to the public interest". Commonly, a prosecutor relies on a proffer of the prospective witness' testimony to make this public interest determination based on the importance of the proffered testimony and the relative culpability of the witness, among other factors. But if an attorney is representing multiple clients some of whom are targets of the investigation, he might be unwilling to advise his clients to cooperate with the Government by proffering testimony in the hope of obtaining immunity. As a result, the prosecutor will have to determine whether to grant immunity without the benefit of a proffer. Thus, those with greater culpability may receive immunity and escape prosecution.[2]

Multiple representation inhibits grand jury cooperation in other ways and also creates an ethical dilemma for defense counsel that may result in one client's interests being favored over another's. Although most employees view the company's interest as their own, this may not always be true. For example, if a non-target employee is represented by his employer's lawyer, the lawyer may not advise the employee to consider cooperation with the Government as an option, and the employee may be reluctant to request another attorney, who might offer such advice, if he thinks he will have to pay the fee. Thus, the Government loses a cooperative witness.

Even where the employee has criminal exposure, his interests may be sacrificed for those of his employer as a result of dual representation. For example, a middle level corporate employee (e.g., chief estimator or branch manager) might become a target of an investigation but also might be able to avoid prosecution by agreeing to

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[2]Since virtually all Sherman Act cases require the testimony of co-conspirators, the Government's objective is to use the least culpable individuals to prosecute the most culpable ones.

cooperate with the Government in exchange for a grant of immunity. The defense lawyer representing this individual as well as the target company or other targets is faced with a dilemma: cooperation with the Government is preferable to being prosecuted from the individual's perspective, but that cooperation may enable the Government to prosecute other clients of the attorney.[3] Under these circumstances, an attorney simply cannot be expected to provide objective advice to the individual concerning his legal options. The damage caused by multiple representation is particularly difficult to assess because the evil frequently "is in what the advocate finds himself compelled to refrain from doing."[4]

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[3]At the grand jury stage, the client has not yet been indicted and counsel's primary duty is to prevent his indictment. If a witness represented by an attorney with a conflict ultimately is indicted and convicted, he may claim that he was denied effective assistance of counsel due to the conflict of interest. See United States v. Canessa, 644 F.2d 61 (1st Cir. 1981); United States v. Lutz, 621 F.2d 940 (9th Cir. 1980), cert. denied, 449 U.S. 859 (1981). These claims rarely will be successful, however, since the 6th Amendment right to counsel does not apply to grand jury proceedings. See, e.g., United States v. Mandujano, 425 U.S. 564, 581 (1976) (dictum) (plurality opinion); Kirby v. Illinois, 406 U.S. 682 (1972); Hannah v. Larche, 363 U.S. 420 (1960); In re Groban, 352 U.S. 330 (1957); United States v. DeRosa, 438 F. Supp. 548, 551 (D. Mass. 1977), aff'd, 582 F.2d 1269 (1st Cir. 1978).

[4]Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (emphasis added). See generally Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-35 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941-50 (1978).

B. The Law Regarding Multiple Representation

Resolution of conflict of interest problems resulting from multiple representation turns on the facts of each case, on the particular jurisdiction where the grand jury is sitting, and on the individual district judge. Attorney disqualification is within the discretion of the district judge supervising the grand jury and that decision will not be reversed on appeal in the absence of abuse.[5] In determining whether to move to disqualify counsel because of multiple representation, two principal legal sources should be consulted – the case law and the Model Code of Professional Responsibility.[6]

1. Leading cases

The case law regarding multiple representation is still evolving and varies from jurisdiction to jurisdiction. Thus, if a multiple representation problem arises, the law of the particular jurisdiction should be consulted. Some common principals may be gleaned from the cases, however, and some representative cases described below may serve as a useful starting point for researching this problem. In addition, the Supreme Court recently provided some guidance in conflict of interest cases in Wheat v. United States, 486 U.S. 153 (1988). The principles of Wheat were

[5]See Wheat v. United States, 486 U.S. 153 (1988); In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976).

[6]Attorneys should also check the local rules as they may contain provisions that relate to multiple representation.

applied to multiple representation in the grand jury stage in In re Grand Jury Proceedings, 859 F.2d 1021 (1st Cir. 1988).

Initially, the Government has standing to request a hearing to determine the existence of a conflict of interest to protect the integrity of any prosecution,[7] and to fulfill its obligation to advise the court regarding matters concerning the Code of Professional Responsibility.[8] A hearing similar to that contemplated under Fed. R. Crim. P. 44(c)[9] should be requested so that the court can explore any conflict of interest, and if such a conflict exists, the court can inquire whether the clients knowingly, intelligently and voluntarily have waived their right to conflict-free representation.[10] To avoid allegations of impropriety or reversal of a disqualification order, all affected parties and their counsel should be present at the hearing.[11]

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[7]See United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977).

[8]In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).

[9]Rule 44(c) outlines procedures for avoiding circumstances that may give rise to post-conviction 6th Amendment claims (See United States v. Akinseye, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987)) and provides in pertinent part that:

> the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to effective assistance of counsel . . . unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

[10]See United States v. Duklewski, 567 F.2d 255, 257 (4th Cir. 1977).

[11]Id. at 256-57 (disqualification of defense counsel after ex parte hearing with the Government and without providing the defendant with the factual basis for disqualification was improper); see also United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); In re Paradyne Corp., 803 F.2d 604, 607, 612 (11th Cir. 1986). But cf. United States v. Akinseye, 802 F.2d at 745 (no disqualification hearing was held but the trial court discussed joint representation with the

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A district court is endowed with supervisory powers to regulate the professional conduct of lawyers who represent clients in criminal trials and the court need not wait for an actual conflict to arise but may "nip any potential conflict of interest in the bud" by disqualifying the offending attorney.[12] The Supreme Court's decision in Wheat specifically held that:

> a presumption in favor of [defendant's] counsel of choice . . . may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.[13]

There is no real consensus on what constitutes an actual or potential conflict sufficient to require separate counsel. But if a court can be convinced that a conflict is actual, disqualification is almost assured. For example, in In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978), the supervising court found an actual conflict where one of the lawyer's clients (some of whom were prospective defendants) was offered immunity. While the court ordered the immunized witness to obtain separate counsel, it believed that disqualification was premature with respect to the other non-immunized witnesses

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[11](...continued)
defendants during an appeal of a magistrate's bond order).

[12]In re Gopman, 531 F.2d at 265-66 (quoting Tucker v. Shaw, 378 F.2d 304, 307 (2d Cir. 1967)); see Pirillo v. Takiff, 462 Pa. 511, 520, 341 A.2d 896, 905 (1975), cert. denied, 423 U.S. 1083 (1976).

[13]486 U.S. at 164; see also United States v. Moscony, 927 F.2d 742 (3d Cir. 1991).

since there was only a potential conflict. In In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976), an attorney was disqualified where he represented several subjects and four non-subjects before the grand jury. The attorney had an actual conflict of interest in representing the non-subjects (two of whom were offered immunity) because their testimony could be detrimental to others represented by the attorney. In In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980), cert. denied, 449 U.S. 1124 (1981), the court found an actual conflict where an attorney represented two individual targets, the target union and 16 subjects of the grand jury investigation. While no witness had been offered immunity, the court believed that it would be a burden and cause significant delay to allow each witness to assert the 5th Amendment privilege. Moreover, if any witness was offered immunity, a conflict was assured.

Some courts have held disqualification proper where there is only a potential conflict. For example, in In re Gopman, 531 F.2d 262 (5th Cir. 1976), the court disqualified an attorney from representing a union and several union officials before a grand jury investigating possible violations of the Labor Management Reporting and Disclosure Act (Landrum-Griffin, 29 U.S.C. §§ 401, et. seq.). None of the clients was a target although each asserted his 5th Amendment privilege and refused to produce subpoenaed union documents. The court found that there was a potential conflict sufficient to warrant disqualification because the union's interest in full disclosure of the records conflicted with the individual's interest, and thus the lawyer could not "aggressively and diligently pursue the [union's interest] while advising the union's own officials on whether to produce the records."[14] In In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977), two attorneys (one of whom was a target) represented ten witnesses, three of whom were targets of the grand jury investigation. The court

[14]531 F.2d at 266.

believed that the attorneys could not adequately represent the interests of each witness because, while cooperation with the prosecution might benefit one client, such cooperation might not benefit others. The court also found that several witnesses were improperly asserting the 5th Amendment privilege to protect others, rather than themselves. Therefore, the court held that "the public's right to the proper functioning of a grand jury investigation, and the judge's duty to maintain the integrity of the grand jury he supervised" justified disqualification.[15] In ordering disqualification, other courts have similarly relied on the public interest, the need for witness cooperation before the grand jury, and the need to protect generally the integrity of the grand jury.[16]

Other courts, however, have been less willing to order disqualification in the absence of an actual conflict.[17] For example, in In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976) (Washington Post), the court held that an attorney retained by a target union to advise 21 union employees, who were not subjects of the grand jury investigation, was prematurely disqualified. The court rejected the Government's contention that the investigation was obstructed because several witnesses made unwarranted assertions of the 5th Amendment privilege or because the Government was unable to discuss the possibility of immunity with these witnesses. The court noted that, rather than seeking disqualification, the Government could and should grant immunity to those witnesses who properly invoke the privilege. The court was unmoved by the Government's

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[15]563 F.2d at 655-57.

[16]See, e.g., Pirillo v. Takiff, 341 A.2d at 904 (allowing two attorneys to represent all members of the Philadelphia Fraternal Order of Police, which paid the lawyers' fees and espoused a policy of not cooperating with an investigation, had a "chilling effect" on cooperation).

[17]The Supreme Court's decision in Wheat, which explicitly sanctions disqualification where there is a potential conflict, might persuade more courts to grant disqualification even where there is only a potential conflict.

protestations that this procedure would require it to grant blind immunity. Similarly, in In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d 1009 (3d Cir. 1976), the court reversed an order disqualifying an attorney who represented nine non-target witnesses, each of whom asserted the 5th Amendment privilege. The court held that the multiple representation and assertions of privilege alone were insufficient to interfere with the witnesses' choice of counsel. Nor was it persuaded by the Government's argument that multiple representation interfered with offers of immunity and plea negotiations.[18]

Unfortunately, there seems to be no agreement on when a conflict is actual as opposed to potential. What some courts consider potential conflicts (e.g., In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (only a potential conflict where two of the lawyer's clients were immunized)), others consider actual conflicts (e.g., In re Grand Jury Proceedings, 428 F. Supp. at 277 (an actual conflict exists where attorney represented four witnesses, two of whom were offered immunity)).[19] Some points do seem clear, however. Multiple representation

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[18]In both Washington Post and In re Grand Jury Impaneled Jan. 21, 1975, one of the principal difficulties was the lack of a record sufficient to justify disqualification. In Washington Post, the court noted the absence of any evidence regarding the nature of the conflict, the clients' awareness of the conflict, and whether the clients would have acted differently if separate counsel were retained. 531 F.2d at 607. In In re Grand Jury Impaneled Jan. 21, 1975, the court intimated that disqualification might have been appropriate if there was evidence in the record that the attorney's fees were being paid by the target union or if some witnesses had been offered immunity and others had not. See also In re Taylor, 567 F.2d 1183, 1188-90 (2d Cir. 1977).

[19]Compare In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d at 1013 (where witnesses only invoked the privilege but were not granted immunity, disqualification was improper), and In re Taylor, 567 F.2d at 1188-90 (same), with In re Investigative Grand Jury Proceedings, 480 F. Supp. supra (while no witness had been offered immunity, the court found an actual conflict warranting disqualification).

combined with assertions of privilege is probably insufficient to disqualify.[20] Nor is multiple representation funded by a common source, without more, sufficient to disqualify.[21] However, a grant of immunity and the possibility that one witness might have information potentially incriminating of other witnesses represented by the same counsel will probably suffice.[22] The dividing line on when disqualification will be ordered may well be the strength of the record of possible adverse consequences flowing from multiple representation.[23]

2. Code of Professional Responsibility

In determining how to handle conflicts of interest before the grand jury, the 1970 Model Code of Professional Responsibility (Code) also provides guidance on lawyers' duties and obligations to their clients.[24]

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[20]See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d supra; In re Taylor, 567 F.2d supra; In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra; In re Special Feb. 1977 Grand Jury, 581 F.2d supra.

[21]See In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979); In re Special Feb. 1975 Grand Jury, 506 F. Supp. 194 (N.D. Ill. 1975); but cf., In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra.

[22]See, e.g., In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d at 655-57; In re Grand Jury Investigation, 436 F. Supp. at 823; In re Grand Jury Proceedings, 428 F. Supp. at 277.

[23]See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d supra; In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra; In re Taylor, 567 F.2d supra; In re Special Grand Jury, 480 F. Supp. supra.

[24]While the original Model Code was adopted in 1970, the ABA adopted a new code in 1983 (See 52 U.S.L.W. 1 (Aug. 16, 1983) (New Code)). The New Code does not apply until the states individually adopt those rules; therefore, in many jurisdictions, the 1970 Code continues to

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Described below are relevant sections of the Code (with citations to equivalent sections in the New Code) that should be consulted in cases of actual or potential conflicts of interest.

Canon 1, DR 1-102(A)(5)[25] provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice."[26] Canon 4 provides that a lawyer should preserve the confidences and secrets of clients,[27] while DR 4-101(B) prohibits the disclosure of the same to the disadvantage of the client. A lawyer representing multiple clients before the grand jury risks violating this rule when interviewing and debriefing his client. Canon 4[28] could also be applied to successive representation because of a lawyer's duty not to disadvantage a former client with knowledge obtained from that relationship.[29]

With respect to conflicts of interest, Canon 5 is perhaps the most important Canon.[30] It provides that a "lawyer should exercise independent professional judgment on behalf of a client", and mandates that a lawyer avoid representing "differing interests", which include "every interest that will adversely affect either the judgment or

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[24](...continued)
govern the conduct of lawyers.

[25]Canons are statements enunciating a lawyer's responsibilities, while Disciplinary Rules (DR) are "mandatory in character", setting forth the minimal standard of ethical conduct which must be observed to avoid disciplinary action. Finally, Ethical Considerations (EC), while potentially useful, are nonetheless only aspirational in character.

[26]See Moore, Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 UCLA L. Rev. 1, 67-69 (1979).

[27]See also New Code, Rule 1.6.

[28]See New Code, Rule 1.9.

[29]See United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982).

[30]See also New Code, Rule 1.7.

loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." In addition, a lawyer may represent two or more clients only if "it is obvious that he can adequately represent the interest of each" and only after "the possible effect of such representation" has been fully disclosed to the client.[31] Canon 5 also regulates compensation from third parties. DR 5-107 allows compensation from a third party only after full disclosure and with the consent of the client.[32] Further, under DR 5-107(b), that third party may not "direct or regulate [the lawyer's] professional judgment."[33]

A person or organization paying a lawyer has the potential to exert strong pressure against the independent judgment of the lawyer and "some employers may be interested in furthering their own economic goals without regard to the professional responsibility of the lawyer to his client."[34] On the other hand, a lawyer retained by a corporation "owes his allegiance to the entity" and not to any officer or employee of the entity.[35] Thus, there is a risk that either the corporation or the employee represented by the same lawyer might suffer from the lawyer's conflicting obligations. Other Ethical Considerations of Canon 5 may also come into play in certain circumstances, such as where the lawyer may be a witness or target of the grand jury investigation.[36]

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[31]DR 5-105(A)-(D).

[32]See also New Code, Rules 1.8(f), 1.13, 5.4(c).

[33]Cf. New Code, Rule 1.13(e) (allowing a lawyer to represent both a corporation and its officers provided there is no conflict).

[34]EC 5-23.

[35]EC 5-18.

[36]See In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977).

Canon 7, which requires a lawyer to "represent a client zealously within the bounds of the law",[37] and Canon 9, which admonishes lawyers to avoid the appearance of impropriety, also may be applicable to cases of multiple representation.[38]

While the Sections of the Code discussed above should be consulted in cases of multiple representation, they are not meant to be exhaustive and other Canons should be considered depending on the particular facts of each case. For example, Canon 1 and DR 1-102(a)(5) and Canon 7 and DR 7-102 taken together support the proposition that it is unethical to advise a client to invoke the 5th Amendment privilege to protect others.[39] There are additional sources that may also prove useful. For example, the American Bar Association's (ABA's) Standards Relating to the Defense Function § 3.5(b)(1980) notes that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations." And, with respect to appointed counsel, the Criminal Justice Act, 18 U.S.C. § 3006A(b), provides that separate counsel must be appointed "for defendants who have such conflicting interests that they cannot properly be represented by the same counsel."

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[37]See Moore, Attorney Disqualification, at 55-56.

[38]See In re Grand Jury Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d at 657 (Canon 9 discussed); In re Abrams, 56 N.J. 271, 276, 266 A.2d 275, 278 (1970) (same). But see In re Special Feb. 1977 Grand Jury, 406 F. Supp. 194, 199 (N.D. Ill. 1975) (Canon 9 inapplicable).

[39]See, e.g., United States v. Fayer, 523 F.2d 661 (2d Cir. 1975).

3. Waiver and other defenses

Attorneys representing multiple clients may assert a number of defenses when the Government seeks disqualification. First, they frequently argue that their clients have a 6th Amendment right to counsel of their choice and a 1st Amendment right to associate for purposes of obtaining counsel. Neither of these arguments has merit. The Supreme Court's decision in Wheat v. United States, 486 U.S. 153 (1988), held that the "6th Amendment right to choose one's own counsel is circumscribed", and "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within ethical standards of the profession." Thus, where a court finds a conflict of interest resulting from multiple representation, "it may . . . insist that defendants be separately represented."[40] 1st Amendment claims have been similarly unsuccessful.[41]

Defense counsel also assert that a client can waive any potential or actual conflict. Waiver arguments have had mixed results. Some courts have held that there can be no waiver of a conflict,[42] while other courts have

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[40]486 U.S. at 159-62; accord In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 250-51 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); In re Paradyne Corp., 803 F.2d 604, 611 n.16 (11th Cir. 1986).

[41]See In re Gopman, 531 F.2d 262, 268 (5th Cir. 1976).

[42]See, e.g., In re Grand Jury Investigation, 436 F. Supp. 818, 821 (W.D. Pa. 1977) (a witness could not waive the right to conflict-free counsel since a waiver was "likely a function in large part of one's natural hesitancy to alienate their employer rather than a product of free unrestrained will"), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976) (a witness cannot "waive the right of the public to an effective functioning grand jury investigation"); In re Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978) (in dictum court stated that witness could not waive actual conflict of interest).

accepted waivers if they were made knowingly and intelligently, with an understanding of all relevant facts.[43] In any event, the decision in Wheat makes clear that a district court

> must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.[44]

Whether a lay defendant has intelligently waived any objections to conflicts of interest[45] is inherently difficult to determine, and generally, the district court is not in a position to educate the defendant fully regarding the possible conflicts.[46] Nor can conflict-ridden counsel be relied on to obtain an informed waiver.[47]

Finally, defense counsel will frequently emphasize the advantages of multiple representation (e.g., economy of legal fees, centralized information and grand jury monitoring that facilitates a unified defense effort), and suggest that the Government is not prejudiced by multiple representation because it can grant immunity,

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[43]See, e.g., In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); see also In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (trial court apprised witnesses of potential conflict and each still desired joint representation).

[44]486 U.S. at 163; see also United States v. Moscony, 927 F.2d 742 (3d Cir. 1991).

[45]See, e.g., United States ex rel. Tonaldi v. Elrod, 716 F.2d 431, 437-39 (7th Cir. 1983).

[46]See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 142-52 (1978).

[47]Id. at 145.

compel testimony, and has the tools (e.g., prosecutions for contempt, perjury or obstruction of justice) to obtain whatever information it needs. While a district court may consider these factors in making a decision to disqualify,[48] they will frequently be outweighed by the need to avoid ethical violations and assure the proper functioning of the judicial system.[49]

C. Resolving Conflicts of Interest

The first step when confronted with dual representation is to contact the defense lawyer and determine who he represents, the scope of his representation and who is paying the legal fees. These factors are important in initially assessing whether there is a conflict. For example, if the lawyer only represents the company and is merely giving limited advice to company employees regarding grand jury matters, that is, explaining the duty to testify when subpoenaed or explaining the 5th Amendment privilege and when it may be asserted, then there is probably no conflict at that point.

Attorneys should require the defense counsel to describe in writing the basis on which he purports to represent various individuals and to document his authority. You should ordinarily require from corporate counsel a

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[48]See, e.g., In re Paradyne Corp., 803 F.2d at 611 n.16; United States v. James, 708 F.2d 40, 45 (2d Cir. 1983).

[49]Wheat v. United States, 486 U.S. at 160-61; United States v. Dolan, 570 F.2d 1177, 1183-84 (3d Cir. 1978); see also United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986); United States v. O'Malley, 786 F.2d 786, 792 (7th Cir. 1986); United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976); United States v. Provenzano, 620 F.2d 985, 1004 (3d Cir.), cert. denied, 449 U.S. 899 (1980); In re Gopman, 531 F.2d at 255.

list of employees who have agreed to be represented rather than accept the attorney's blanket assertion that he represents everyone. You may also wish to have the lawyer's assurance that he has discussed the multiple representation issue with his clients, as well as potential problems, for example, your desire to obtain a proffer from one of his clients and the untenable position of the lawyer advising that client. Counsel should be willing to represent that he has communicated your specific requests, for example, for a proffer, to his client and that the client is aware of the potential conflict, but nonetheless desires counsel's representation. If some of the attorney's clients are targets, you should explicitly advise counsel of the actual and potential conflicts that may result from his continued multiple representation. To the extent that you can tell counsel which of his clients are targets, subjects and nonsubjects, you should ordinarily do so, since this will assist him in evaluating any conflicts.

These initial discussions may be sufficient to convince defense counsel that it is inappropriate for him to continue to engage in multiple representation. If new counsel is hired, you should keep in mind that the company may still be paying the legal fees, in which case the individual's loyalty may still be to the company, and the hiring of separate counsel may not result in more cooperation with the investigation.

If defense counsel declines to cease his multiple representation, your next step will be to analyze the facts, build an adequate record, and consider a disqualification motion. For example, if the lawyer represents multiple targets who can incriminate one another, a disqualification motion may be appropriate and successful.[50] In addition, if defense counsel has advised clients to invoke the 5th Amendment privilege, you should consider which of his clients you are prepared to immunize. If you can offer immunity to a particular client, that may be enough either to

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[50]See In re Special Feb. 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Grand Jury Investigation, 436 F. Supp. 818, 820 (W.D. Pa. 1977), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978).

convince the lawyer of the conflict or to support a motion to disqualify.[51] You should also consider whether there are alternative sources of information for the testimony of the witness you are considering immunizing.

If defense counsel is still unwilling to cease representing multiple clients, you should next attempt to obtain additional factual information from one or more of the attorney's clients that might support a motion to disqualify. This information might be obtained by interviewing the client (presumably with his counsel present), or, in appropriate circumstances, by questioning the client before the grand jury. In the event that the witness does not assert his 5th Amendment privilege or invoke the attorney-client privilege,[52] the witness should be asked about how he met counsel and any arrangements, including fee arrangements, regarding the attorney's representation. The witness should also be asked about who else is represented by the same counsel and any arrangements the witness is aware of with those clients. Finally, the witness should be asked about whether he understood that his counsel represented others and that as a result, there may be conflicts of interest. Care should be taken to avoid asking questions that may elicit confidential information protected by the attorney-client privilege. To the extent that you decide to compel the witness to testify before the grand jury without separate counsel and without moving to disqualify, you should consider getting the witness to waive on the record his right to conflict-free representation.

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[51] In re Grand Jury Investigation, 436 F. Supp. at 823; In re Grand Jury Proceedings, 428 F. Supp. 273, 277 (E.D. Mich. 1976).

[52] While questions concerning a witness' legal representation are not likely to incriminate him, a witness who has not been immunized might nevertheless erroneously assert the 5th Amendment privilege, thus requiring Government counsel to file a motion to compel or obtain an immunity order. Similarly, the attorney-client privilege should not prevent disclosure of the identity of the lawyer representing the client, the scope or object of the employment and other background information that does not disclose confidential communications. See generally Ch. III § C.1.a.; Ch. IV § A.; E. Cleary, McCormick on Evidence §§ 89-90 (3d ed. 1984).

If, after having built a record, you decide to move for disqualification, the motion should be accompanied by an affidavit setting forth supporting facts.[53] You should set forth the record of your contacts with opposing counsel and attach your correspondence as exhibits. The affidavit should only set forth the minimum necessary to establish a conflict, and should avoid disclosing facts prematurely (e.g., the basis for your belief that the lawyer's clients can incriminate one another).

At the hearing on the motion, you should ask the court's permission to interrogate the witness, again with a view toward establishing a conflict. For example, the witness should be questioned about his understanding of the attorney-client relationship, the lawyer's obligation to other clients, possible conflicts and the fee arrangement. You might want to question the witness specifically about the 5th Amendment, immunity, and the benefits of cooperation. Where there is an employer-employee relationship between clients, you should seek answers establishing coercion, i.e., that the witness is in no position to ask for separate counsel.[54] Again, caution should be exercised to avoid infringing on the attorney-client privilege.

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[53]There are several benefits that may be derived from a motion to disqualify. First, if successful, one or more targets thereafter may be willing to cooperate (as a result of conflict-free advice from a new attorney). Second, even if unsuccessful, the attorney will be sensitive to the potential conflict and more likely to obtain separate counsel for the client should later developments make the conflict more apparent.

[54]The Government has generally taken the position that a witness cannot waive the public's right to a proper functioning grand jury. Nonetheless, you should advise the court that any waiver must be knowingly and intelligently made.

D. Appeals

1. Appeals by defense counsel

An order disqualifying counsel for a witness in a grand jury investigation is not a final judgment, and, therefore, generally is not immediately appealable. While several courts have permitted appeals from such orders on the grounds that they are "collateral orders",[55] the Supreme Court's decision in United States v. Flanagan, 465 U.S. 259 (1984), establishes that the "collateral order" exception to the final judgment rule does not apply to attorney disqualification orders.[56] Relying on these more recent Supreme Court decisions, the Seventh Circuit in In re Schmidt, 775 F.2d 822 (7th Cir. 1985), has expressly held that an order disqualifying an attorney for a grand jury witness is not appealable. Under Schmidt, to obtain appellate review of such an order, a witness would have to be held in contempt and then appeal from the contempt judgment. Alternatively, rather than filing a direct appeal, defense counsel might seek review of a disqualification order by filing a mandamus petition. Mandamus, however, is an extraordinary remedy that is rarely granted.ifc Cf. United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (court refused to review pretrial disqualification order by writ of mandamus, but reversed the convictions on appeal from the judgment of conviction because the Government failed to justify disqualification). [57]

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[55]See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); In re Gopman, 531 F.2d 262 (5th Cir. 1976).

[56]See also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (order denying motion to disqualify counsel in civil case not appealable).

[57]Cf. United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (court refused to review pretrial (continued...)

2. Appeals by the Government

It is unclear whether the Government may appeal from the denial of a motion to disqualify. The Criminal Appeals Act, 18 U.S.C. § 3731, does not include orders denying motions to disqualify in the list of orders from which the Government may appeal.[58] Nor is it clear whether the Government can argue that the "collateral order" exception applies.[59] Finally, like defense counsel seeking review of a disqualification order, the Government may file a petition for a writ of mandamus, although this remedy is rarely granted.

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[57](...continued)
disqualification order by writ of mandamus, but reversed the convictions on appeal from the judgment of conviction because the Government failed to justify disqualification).

[58]Government appeals are not necessarily limited to those expressly listed in 18 U.S.C. § 3731. See United States v. Wilson, 420 U.S. 332, 337 (1975) (while the language of the Criminal Appeals Act is "not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit"); see also United States v. Hetrick, 644 F.2d 752, 755 (9th Cir. 1980); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982). But see Government of the Virgin Islands v. Douglas, 812 F.2d 822, 829 (3d Cir. 1987) (Government appeals limited by express language of the Criminal Appeals Act).

[59]See In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1264 (7th Cir. 1978) (Government may appeal under the collateral order exception). But see In re Schmidt, 775 F.2d 822, 825 (7th Cir. 1985).